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Vertical restraints and the effects-based revolution: a 20-year retrospective. Has modernisation delivered?

Summary of Reasons for, and Goals of, Modernisation

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| 1. Over-reliance on category of object restraints | 1. More realistic analysis under Art 101 (esp 101(1)) |
| 2. Formalistic analysis of effects – imprecise criteria | 2. Focus on <i>market power</i> and GLs |
| 3. Rigid BERs – straightjacketing impact | 3. More flexible, economic BERs |
| 4. Difficulty of gaining an exemption | 4. Abolition of notification (Art 101(3) at national level) |
| 5. Analysis in categories (eliminates heart of antitrust) | 5. Analysis based on effects (not form), reflecting a consumer welfare objective |
| 6. Bottleneck (many caught by Art 101(1) and required exemption), system failure! | 6. New approach a success! |

New system a success?

- Considerable legal certainty welcomed by business – de minimis and BER
- EU competition authorities resources to focus on protection of competition not review of innocuous agreements
- *But* system still continues to rely heavily on presumptions of legality (especially BER) and illegality (59 out of 76 cases concerned by object restrictions)
- Outside little modern case-law emerging
- Does this matter?

A coherent effects based system needs to balance - legal certainty, administrability and accuracy. Full appraisal not required/ feasible in every case. Rather mix of rules and standards:

Rule/ strong presumption of illegality

- For manifestly anticompetitive conduct that unlikely to have offsetting benefits – procedural economy, deterrent, savings
- To minimise risk of overinclusive rule and false positives should be referable to theory of harm and, even then, involve a principled characterisation process (focus not only on content but also context)

Rule/ strong presumption of legality

- Immunising conduct that ordinarily benign through rules/ safe harbours

Workable standards where presumptions do not apply

- To prevent analysis becoming too formless
- Analytical shortcuts and guidance from expert agencies and courts

Different analysis all underpinned and linked by unifying concepts - objectives

Do some of pre-modernisation problems remain?

Object/Hardcore restraints –

- Virtual rule of illegality: object, hardcore restraint; meeting Art 101(3) unlikely?
- Continued reliance; not narrowed (somewhat expanded – new circumstances and restraints); focus on content – little contextual analysis . Focus remains on intrabrand restraints
- Risk that overinclusive?

Rule/ strong presumption of legality – to reduce uncertainty

- Helpful safe harbours - de minimis – BER (but still focus on Art 101(3))
- New BER better reflects objectives and prospective withdrawal possible

Where presumptions do not apply

- Still relatively little ‘modern’ guidance of how to conduct effects analysis (guidance needs updating)
- Little evolution in jurisprudence which suggests different analysis for for different types of agreement - not all easy to reconcile with underlying objective and GLs
- Some inconsistent applications (consultation – identified concern about national discrepancies on particular issues)
- Heart still missing?

Proposals for further developing the modernised framework

A modernised approach to object restraints

- The crucial importance of the characterisation exercise (*Cartes Bancaires*) and context even in object cases
- New restraints – only where theory, experience, contextual analysis justifies
- Decoupling of hardcore restraints in BER and object restraints – open avenue to de minimis rule and fuller analysis under Art 101(1)

A new analytical framework for 'effects' analysis

- In tune with economics and consistent with merger analysis
- Case-law still suggests analysis that differs depending on type of agreements at issue

Evolution through decision-taking by the Commission based on effects analysis (development of the law) –

- Construct new framework for approval by EU courts
- Also through clarification in new guidelines
- Develop structure for NCAs and national courts to follow

CONCLUSION

Modernisation– how to align EU law with mainstream economic thinking and to ensure law reflects underpinning objectives (based on effects not form)?

No dramatic change required – e.g., not no object restrictions (as in Sylvania/ Leegin) or no hardcore restraints

But propose more gradual but nonetheless significant evolution through move away from categories to more concept-based approach (focusing on harm/ adverse effects/ efficiencies)